UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
DAIRY FARMERS OF AMERICA, et al.,	)	Civil Action No. 00-1663
	)	
	)	
Defendants.	)	

COMPETITIVE IMPACT STATEMENT

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

On March 31, 2000, the United States filed a civil antitrust suit alleging that the proposed acquisition by Dairy Farmers of America, Inc. ("DFA") of SODIAAL North America Corporation ("SODIAAL") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. The Complaint alleges that the combination of DFA and SODIAAL would substantially lessen competition in the markets for the sale of branded whipped and branded stick butter in the Philadelphia and New York City metropolitan areas. The United States District Court for the Eastern District of Pennsylvania entered a Temporary Restraining Order on March 31, 2000, prohibiting the parties from consummating their proposed transaction and setting the government's Motion for

Preliminary Injunction for hearing.

According to the Complaint, the proposed acquisition would create a duopoly in the markets for branded stick and branded whipped butter in the Philadelphia and New York metropolitan areas. Land O' Lakes is the chief competitor to the SODIAAL brands in these regions. Combined, DFA (including the SODIAAL brands) and Land O' Lakes would control more than 90 percent of the sales of branded stick and branded whipped butter in these markets.

Moreover, because both DFA and Land O' Lakes are agricultural cooperatives they are entitled to federate their branded butter businesses under the Capper-Volstead Act, 7 U.S.C. §291, which exempts from antitrust scrutiny collective marketing by or on behalf of agricultural production cooperatives. SODIAAL, however, does not have the benefit of the Capper-Volstead exemption. Thus, DFA's acquisition of the SODIAAL assets would bring the important SODIAAL brands under the control of an exempt cooperative. As a result, prices for branded stick and branded whipped butter sold to retailers and consumers in the Philadelphia and New York metropolitan areas likely would increase.

The prayer for relief in the Complaint seeks: (1) a judgment that the proposed acquisition would violate Section 7 of the Clayton Act and (2) temporary and permanent injunctive relief that would prevent DFA from acquiring control of, or otherwise combining its assets with, SODIAAL.

On May 18, 2000, the United States filed a proposed Stipulation and Order and proposed Final Judgment that would permit DFA to complete its acquisition of SODIAAL but prohibit it from federating with Land O' Lakes, Inc. with respect to the marketing and sale of branded butter.

The proposed Final Judgment requires DFA to form "Butter LLC," a limited liability

company to be majority-owned by DFA and minority-owned by persons other than DFA (i.e., former SODIAAL managers).[1/] DFA and/or SODIAAL must contribute to Butter LLC assets necessary to produce and market the brands of butter DFA and SODIAAL have sold in New York and Philadelphia. Butter LLC will not be an agricultural cooperative and thus will not be entitled to Capper-Volstead immunity.

The proposed Final Judgment also enjoins DFA and Butter LLC, individually and collectively, from entering into any federation with Land O' Lakes with respect to the marketing, promotion, sale, or distribution of branded butter. DFA and Butter LLC are further prohibited from disclosing to Land O' Lakes any competitively sensitive information regarding branded butter.

The Stipulation and Order, which was entered by the Court on May 19, 2000, permits the defendants to close their transaction but requires that they act in accordance with, abide by, and comply with, the terms of the proposed Final Judgment pending its entry by the Court. The parties have agreed that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

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[1] Butter LLC will do business under the name *Keller's Creamery, L.L.C.*

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE VIOLATIONS ALLEGED IN THE COMPLAINT

A. The Defendants and the Proposed Transaction

DFA is an agricultural cooperative based in Kansas City, Missouri. It owns and operates dairy processing plants throughout the United States, including butter-producing plants in Winnsboro, Texas, and Goshen, Indiana. DFA produces, processes, markets, advertises, and sells *Breakstone's* branded butter (under license from Kraft Foods, Inc.) throughout the eastern United States, including the greater Philadelphia and New York metropolitan areas. The *Breakstone's* brand was founded in 1882. In 1998, the company recorded net sales of approximately $7.3 billion.

SODIAAL, headquartered in Harleysville, Pennsylvania, is a privately held subsidiary of a French cooperative, Societe de Diffusion Internationale Agro-Alimentaire. It owns and operates one butter-producing plant, Mayfair Creamery, in Somerset, Pennsylvania. SODIAAL produces, markets, advertises, and sells *Keller's* and *Hotel Bar* branded butter in the northeastern United States, including the greater Philadelphia and New York metropolitan areas. The *Keller's* brand was founded in 1906; the *Hotel Bar* brand was founded in 1885. In 1998, SODIAAL had net sales of approximately $238 million.

On or about December 15, 1999, DFA entered into a letter agreement with Societe de Diffusion Internationale Agro-Alimentaire, to purchase, for about $36 million, substantially all of the assets of SODIAAL. This transaction, which would eliminate the sole remaining, significant, privately held (i.e., non-cooperative) branded butter producer in the Philadelphia and New York markets, precipitated the government’s suit.

B. *The Competitive Effects of the Transaction*

1. The Relevant Product Markets for Branded Stick and Branded Whipped Butter

Butter is sold to consumers at retail in a variety of forms (e.g., quarter-pound butter sticks, whipped butter, lightly salted butter, and unsalted butter) and package sizes (e.g., one-pound packages comprising four quarter-pound sticks, one-half pound packages comprising two quarter-pound sticks, and eight-ounce tubs of whipped butter). In the greater Philadelphia and New York metropolitan areas combined, approximately 84 percent of butter sold at retail is in stick form. An additional 14 percent is whipped and is typically sold in half-pound (eight-ounce) tubs.

The unique characteristics of butter differentiate it from potential substitutes such as margarine. While spreads such as margarine compete in a limited way with butter, because of butter's unique qualities and characteristics, if the price of butter were increased by a small but significant amount, a sufficient number of purchasers would not switch to other products to make such a price increase unprofitable.

Most butter is sold to consumers through retail outlets, such as grocery stores and mass merchandisers. Consumers purchase two distinct categories of butter -- branded butter (such as *Keller's, Hotel Bar, Breakstone's,* and *Land O' Lakes*) and private label butter (*i.e.*, butter marketed under a label owned or controlled by the retailer) -- and two distinct forms of butter -- stick and whipped.[2/]

The sale of branded whipped butter through retail outlets is a relevant product market for

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[2] A small percentage of butter sold at retail (approximately 2% in Philadelphia and New York) is purchased in "specialty" forms such as shaped holiday molds.

antitrust purposes. Retail consumers of branded whipped butter consider it to be a distinct product from private label whipped butter, stick butter, and other products. With respect to private label whipped butter, consumers perceive branded whipped butter to possess different quality characteristics. These perceptions have been reinforced by years of promotions and brand advertising. In addition, branded whipped butter has different principal users and is manufactured and packaged differently from stick butter (branded and private label) and other products. Accordingly, a small but significant increase in the price of branded whipped butter will not cause a sufficient number of consumers of branded whipped butter to substitute other products (including private label whipped butter and stick butter) to dissuade a hypothetical monopolist from such a price increase.

The sale of branded stick butter through retail outlets is also a relevant product market for antitrust purposes. Retail consumers of branded stick butter consider it to be a distinct product from private label stick butter, whipped butter, and other products. As with branded whipped butter, consumers perceive quality differences between branded stick butter and private label stick butter. In addition, branded stick butter has different principal users and is manufactured and packaged differently from whipped butter and other products. A small but significant increase in the price of branded stick butter will not cause a sufficient number of consumers of branded stick butter to substitute other products (including private label stick butter and whipped butter) to dissuade a hypothetical monopolist from such a price increase.

Although branded products do not always comprise relevant markets, there is no principle of law or economics that implies that relevant markets cannot be limited to such products. Whether the market is properly limited to branded products is determined by an application of the

general market delineation principles articulated in the Horizontal Merger Guidelines. In Section 1.0, the Guidelines state:

> A market is defined as a product or group of products and a geographic area in which a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a "small but significant and nontransitory" increase in price, assuming the terms of sale of all other products are held constant. A relevant market is a group of products and a geographic area that is no bigger than necessary to satisfy this test.

Stated differently, relevant product markets are delineated by determining the likely buyer response to a "small but significant and nontransitory" price increase (typically in the range of 5-10%) imposed by a hypothetical monopolist. If, in response to a price increase, buyers would switch to products outside the candidate market in sufficient numbers so that the hypothetical monopolist would not find it profit maximizing to increase price at least a "small but significant and nontransitory" amount, the candidate market is drawn too small.

A critical factor in applying the Merger Guidelines' market definition principles is "elasticity of demand," which measures the responsiveness of the quantity demanded for a product to changes in its price. Elasticity of demand is generally defined as the ratio of the percentage change in quantity demanded of a product to the percentage change in price that induced the quantity change. A high elasticity of demand for a product or group of products implies that good substitutes exist (and thus that the product or group of products is not likely to comprise a relevant market for antitrust purposes), while a low elasticity implies that substitutes are poor (and thus that the product or products may comprise a relevant market).

When the requisite data are available, the Merger Guidelines' market definition principles are applied empirically. Using data supplied by the parties to determine product margins, the

United States can employ standard economic analysis to determine the "critical elasticity of demand" (i.e., the demand elasticity value below which a hypothetical monopolist would impose at least the requisite "small but significant nontransitory price increase"), and compare it to the estimated elasticity of demand for a candidate market.[3/] An essentially equivalent approach identifies a critical sales loss corresponding to a designated threshold for a significant price increase. The latter approach has been used by several courts. FTC v. Tenet Health Care Corp., 186 F.3d 1045, 1050-51, 1053-54 (8th Cir. 1999); California v. Sutter Health System, 84 F. Supp. 2d 1057, 1076-80 (N.D. Cal. 2000), aff'd mem., __ F.3d __, 2000 WL 531847 (9th Cir. 2000). The results of a critical elasticity analysis performed using data provided by the merging firms and Land O'Lakes during the course of the government's investigation of the proposed merger support the alleged relevant product markets for branded stick and branded whipped butter.

2. The Relevant Geographic Markets of Philadelphia and New York Metropolitan Areas.

Both DFA's and SODIAAL's brands of butter are sold and compete directly in the greater Philadelphia and New York metropolitan areas. DFA sells its *Breakstone's* brand in both the Philadelphia and New York metropolitan areas, while SODIAAL sells its *Keller's* brand primarily in the Philadelphia metropolitan area and its *Hotel Bar* brand primarily in the New York metropolitan area. Due to local consumer preferences for specific brands, retailers and other consumers would not readily substitute brands of butter that had not been promoted and sold in

[3] For a more detailed discussion of the use of critical demand elasticities in delineating antitrust markets, see Gregory J. Werden, Demand Elasticities in Antitrust Analysis, 66 Antitrust L.J. 363, 384-96 (1998).

the greater Philadelphia and New York metropolitan areas, and are likely to pay higher prices as a result of the proposed acquisition.

Differing consumer preferences in different geographic areas cause DFA and SODIAAL to charge different net prices for the same product sold in different geographic areas. The variations in price do not simply reflect differences in costs, but rather reflect local differences in brand strength, competition, and competitive strategy. Price variations often take the form of advertising allowances, local promotions, and couponing campaigns. DFA and SODIAAL develop distinct marketing plans for the Philadelphia metropolitan area and for the New York metropolitan area.

It would be not be practical for retailers located in a higher-priced area to purchase branded stick or branded whipped butter from retailers in a lower-priced area. Such arbitrage, also known as "diversion," is not practical for retailers because of the control producers maintain over the distribution and sale of their products. Producers, like the defendants, structure locally targeted price concessions to prevent arbitrage and often require proof of local advertising, coupon limitations, and other promotional restrictions.

Accordingly, for the purposes of antitrust analysis, the greater Philadelphia and New York metropolitan areas each constitute a relevant geographic market.

3. The Effects of the Transaction on Competition in the Markets for Branded Stick and Branded Whipped Butter in Philadelphia and New York.

According to the Complaint, the proposed acquisition will reduce competition substantially for the sale of branded stick and branded whipped butter in the Philadelphia and New York metropolitan areas.

The Complaint alleges harm resulting from post-acquisition anticompetitive coordination between DFA and Land O' Lakes, Inc. DFA and SODIAAL are two of only three significant suppliers of branded butter in the greater Philadelphia and New York metropolitan areas. The third is Land O' Lakes, a cooperative with approximately $6 billion in annual sales, and the largest butter manufacturer in the United States. Post-transaction, more than 90 percent of the branded stick and branded whipped butter sold in the greater Philadelphia and New York metropolitan markets will be supplied by either DFA or Land O' Lakes. Economic analysis predicts that DFA and Land O' Lakes would find anticompetitive coordination to be profit-maximizing, particularly because both firms (unlike SODIAAL) are agricultural cooperatives between whom explicit collusion would be legal and could not be challenged under the antitrust laws. As a result, in the absence of relief, post-transaction prices would likely increase.

The Complaint also alleges that entry into the sale of branded stick and branded whipped butter in the greater Philadelphia and New York metropolitan areas is difficult. Such entry requires substantial, sunk promotional, and advertising expenditures. Establishing a branded butter product takes years of effort and would not be timely, likely, or sufficient to deter any exercise of market power by branded butter suppliers in the relevant markets following the acquisition by DFA of SODIAAL.

In order to prevent the consummation of the proposed acquisition, the Complaint had to be prepared on the basis of a preliminary analysis. That analysis suggested that the acquisition likely would also give rise to a unilateral anticompetitive effect resulting directly from the loss of competition between DFA and SODIAAL. Consequently, the Complaint also alleged this sort of anticompetitive effect. However, extensive post-Complaint analysis of the competitive interaction

between DFA's *Breakstone's* brand and SODIAAL's *Keller's* and *Hotel Bar* brands has indicated that the proposed acquisition would not likely give rise to significant unilateral anticompetitive effects.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The relief described in the proposed Final Judgment is designed to eliminate the anticompetitive effects of the acquisition in the markets for the sale of branded butter in the Philadelphia and New York metropolitan areas.

A. The Formation of Butter LLC as a Non-Cooperative Entity

The proposed Final Judgment requires DFA to form Butter LLC and ensures the transfer to Butter LLC of all assets necessary to manufacture and market the *Breakstone's*, *Keller's*, and *Hotel Bar* brands. Butter LLC will be owned in part by persons other than DFA (i.e., members of the premerger SODIAAL management team) and thus, unlike DFA, it will not qualify as an agricultural cooperative entitled to engage in collective marketing under the Capper-Volstead Act. In addition, both DFA and Butter LLC would be bound by the injunctive provisions of the Final Judgment described below.

Neither DFA nor Butter LLC may dispose of either the *Keller's* or *Hotel Bar* brands (or both) to an "Agricultural Cooperative" (as defined in the proposed Final Judgment) unless the transferee agrees to be bound by the provisions of the Final Judgment. Similarly, disposition of these brands to any entity in which DFA holds a minority ownership interest, but which is not included within the definition of DFA in the Final Judgment, requires that the transferee agree to be bound by the Final Judgment. Disposition of the brands to any other entity (except Land O'

Lakes) cannot be made without 30 days prior notice to the Department of Justice. Such notice shall include the provision of all supply contracts then existing or contemplated between the transferor and transferee. Finally, any transfer of control over the brands to Land O' Lakes would require the Department's prior written approval, as would receipt by Butter LLC (or DFA) of control over any Land O' Lakes brand.

B. The Injunctive Provisions

The proposed Final Judgment also enjoins DFA and Butter LLC from entering into any Federation with Land O' Lakes with respect to branded butter. "Federation" is defined in the proposed Final Judgment as:

> (1) An agency in common, federation, pooling arrangement, merger or other combination or collaboration, including, but not limited to, any agreement on price or output, involving DFA's and/or Land O'Lakes' Branded Butter operations; or
>
> (2) An agreement, directly or indirectly, between DFA and Land O' Lakes with regard to the price, quantity, sale or supply of cream, milk, or butter to Butter LLC pursuant to which DFA, Land O'Lakes, or both would charge Butter LLC more for cream, milk or butter than either one or both charge other customers. However, nothing in this paragraph shall prohibit price differentials that are reasonably based on differences in purchase volume, freight or shipping costs, federal regulation or product quality.

For purposes of illustration, the defendants have acknowledged that a federation between DFA and Land O' Lakes "involving [their] Branded Butter operations," prohibited by paragraph (1) above, would include an agreement on non-Branded Butter that has the purpose and effect of tying up substantial capacity otherwise available (and used) to produce Branded Butter. Similarly, an "indirect" agreement between DFA and Land O' Lakes of the type prohibited by paragraph (2) above would exist if a non-majority-owned affiliate of DFA forms an agreement

with Land O' Lakes with regard to the price, quantity, sale, or supply of cream, milk, or butter to Butter LLC and the non-majority-owned affiliate forms a related agreement with DFA with regard to the price, quantity, sale or supply of cream, milk, or butter to Butter LLC.

DFA and Butter LLC are also enjoined from disclosing to Land O' Lakes, directly or indirectly, competitively sensitive information regarding branded butter. "Competitively Sensitive Information" is defined as:

> information that is not public and could be used by a competitor or supplier to make production, pricing, or marketing decisions including, but not limited to, information relating to costs, capacity, distribution, marketing, supply, market territories, customer relationships, the terms of dealing with any particular customer (including the identity of individual customers and the quantity sold to any particular customer), and current and future prices, including discounts, slotting allowances, bids, or price lists. "Competitively Sensitive Information" does not include information that must be disclosed to implement a supply arrangement in the ordinary course of business.

C. Compliance Provisions

DFA and Butter LLC are required under the proposed Final Judgment to distribute copies of the proposed Final Judgment and this Competitive Impact Statement to: (1) all current and future directors, officers and Branded Butter sales and marketing personnel; and (2) Land O' Lakes, Inc. In addition, DFA and Butter LLC must brief, annually, those directors, officers, and employees receiving copies of the Final Judgment and Competitive Impact Statement, on the meaning and requirements of the Final Judgment and the antitrust laws, including penalties for violation thereof. DFA and Butter LLC must also obtain written certifications from these individuals that they: (1) have read, understand, and agree to abide by the Final Judgment; (2) understand that noncompliance with the Final Judgment may result in a conviction for criminal contempt of court; and (3) have reported violations, if any, of the Final Judgment of which they

are aware to counsel for the respective company. Finally, both DFA and Butter LLC must designate a specific individual for each company to be responsible for ensuring that the compliance provisions are satisfied.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. §15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. §16(a), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against defendant.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The parties have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry of the decree upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should

do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the response of the United States will be filed with the Court and published in the Federal Register. Written comments should be submitted to:

J. Robert Kramer II
Chief, Litigation II Section
Antitrust Division
United States Department of Justice
1401 H Street, NW, Suite 3000
Washington, D.C. 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against defendants DFA, SODIAAL and Societe de Diffusion Internationale Agro-Alimentaire. The United States could have continued the litigation to seek preliminary and permanent injunctions against DFA's acquisition of SODIAAL. The United States is satisfied, however, that the requirements and prohibitions contained in the proposed Final Judgment will establish, preserve and ensure viable competitors in each of the relevant markets identified by the government. To this end, the United States expects that the proposed relief, once implemented by

the Court, will likely prevent DFA's acquisition of SODIAAL from having significant adverse competitive effects.

VII. STANDARD OF REVIEW UNDER THE APPA FOR PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty (60) day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." In making that determination, the court *may* consider--

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
>
> (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. §16(e). As the Court of Appeals for the District of Columbia Circuit has held, the APPA permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. See United States v. Microsoft, 56 F.3d 1448 (D.C. Cir. 1995).

In conducting this inquiry, "the Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less

costly settlement through the consent decree process."[4/] Rather,

> absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. Mid-America Dairymen, Inc., 1977-1 CCH Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." United States v. BNS, Inc., 858 F.2d 456, 462 (9th Cir. 1988) (quoting United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981)); see also Microsoft, 56 F.3d 1448 (D.C. Cir. 1995). Precedent requires that:

> the balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest.*" More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[5/]

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[4] 119 Cong. Rec. 24598 (1973). See United States v. Gillette Co., 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. See H.R. 93-1463, 93rd Cong. 2d Sess. 8-9, reprinted in (1974) U.S. Code Cong. & Ad. News 6535, 6538.

[5] United States v. Bechtel, 648 F.2d at 666 (citations omitted) (emphasis added); see United States v. BNS, Inc., 858 F.2d at 463; United States v. National Broadcasting Co., 449 F. Supp.

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" [6/]

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: June __, 2000.

1127, 1143 (C.D. Cal. 1978); United States v. Gillette Co., 406 F. Supp. at 716. See also United States v. American Cyanamid Co., 719 F.2d at 565.

[6] United States v. American Tel. and Tel. Co., 552 F. Supp. 131, 151 (D.D.C. 1982) (quoting United States v. Gillette Co., supra, 406 F. Supp. at 716) (citations omitted), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983); United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky. 1985).

Respectfully submitted,

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